THE ORIGIN OF THE PECULIAR DUTIES OF PUBLIC SERVICE COMPANIES.[1]

PART III.

The cases so far considered have dealt with the peculiar duties imposed by the common law on the so-called public service companies. But it is now clear that such duties may be imposed upon businesses by statute when such businesses would not be subject to those duties under any of the principles previously discussed.

When the common law already imposes upon a business the duty to serve for reasonable compensation, it is not difficult to justify legislation which determines the amount of such compensation, as the legislative regulation of the performance of a recognized legal duty.[2] However, the justification of legislation which both creates and regulates the duty to serve at a particular rate is not so obvious.

Every discussion in this field must start with *Munn* v. *Illinois*.[3] In that case the Supreme Court of the United States determined that a statute of the State of Illinois fixing the maximum rate to be charged for storing and handling grain in warehouses, where grain was stored for a compensation, was constitutional. The majority of the court declared, through Mr. Chief Justice Waite, that regulating the rate of compensation in a business is not taking property without due process of law, if such regulation is a proper exercise of the police power. The Chief Justice said:[4]

"Under these [the police] powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good."

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[1]The first two parts of this article appeared in the preceding numbers of the COLUMBIA LAW REVIEW, and are to be found at pages 514 and 616 of the present volume.

[2]In Cooley, Constitutional Limitations (7th ed.) 873, the author in speaking of rate regulation says: "If one is permitted to take upon himself a public employment, with special privileges which only the state can confer upon him, the case is clear enough." See Freund, Police Power § 377; Mr. Justice Brewer's dissenting opinion in Budd *v.* New York (1891) 143 U. S. 517, 549, and the cases cited by Mr. Justice Brewer in Cotting *v.* Kansas City Stock Yards Co. and The State of Kansas (1901) 183 U. S. 79, at the middle of p. 85.

[3](1876) 94 U. S. 113.

[4]*Ibid.* 125.

The court continued:[5]

"This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what without its operative effect. Looking, then, to the common law, from whence came the right which the constitution protects, we find that when private property is 'affected with a public interest, it ceases to be *juris privati* only.' This was said by Lord Chief Justice Hale more than two hundred years ago, in his treatise *De Portibus Maris,* 1 Harg. Law Tracts, 78, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control."

The Chief Justice next quoted[6] at some length from those parts of Hale's *De Jure Maris* and *De Portibus Maris,* where are discussed the duties of ferry owners and wharf owners, and from *Allnutt* v. *Inglis.*[7] In this case it was determined that one who exercises a legal monopoly must serve for reasonable compensation, but there is also a *dictum* included in the quotation to the effect that the same duty rests upon one who has acquired a virtual monopoly. Then the Chief Justice continued:[8]

"But we need go no further. Enough has already been said to show that when private property is devoted to a public use, it is subject to public regulation. It remains only to ascertain whether the warehouses of these plaintiffs in error, and the business which is carried on there, come within the operation of this principle."

The Chief Justice then proceeded to show that the business in question is of great public importance in that a great part of the grain produced in the West and North-west passes through the Chicago grain elevators, and that[9]

"it is apparent that all the elevating facilities through which these vast productions 'of seven or eight great states of the West' must

[5] *Ibid.* 125, 126.
[6] *Ibid.* 126-129.
[7] (1810) 12 East 527.
[8] Munn *v.* Illinois (1876) 94 U. S. 113, 130.
[9] *Ibid.* 131.

pass on the way 'to four or five of the States on the seashore' may be a 'virtual' monopoly."

From this he concluded that,

"Certainly, if any business can be clothed 'with a public interest, and cease to be *juris privati* only,' this has been."

Two justices dissented from this majority view in the Supreme Court of Illinois, and the same number of justices dissented in the Supreme Court of the United States. Mr. Justice Field of the latter court in his able dissenting opinion[10] declared that the defendants were deprived of their property, and that the statute by which this was effected was not an exercise of the police power, which justifies regulation of the manner in which property may be used, but has nothing properly to do with the regulation of compensation for services or for use of property. Mr. Justice Field further asserted that the authorities depended upon by the majority are not in point, but that Hale in those parts of his works which were quoted, and the court in *Allnutt* v. *Inglis* were dealing with situations where persons had been granted some franchise, or were occupying property dedicated to the public.

Fifteen years later the case of *Budd* v. *New York*[11] was decided by the Supreme Court of the United States. Judge Andrews' opinion in this case in the Court of Appeals of New York[12] is decidedly the most able and scholarly exposition of the view that such legislation as was here under consideration is a legitimate exercise of the police power. He opened his opinion by recognizing that those owning ferries and wharves where tolls were taken were at common law doing so in the exercise of public franchises, and that *Allnutt* v. *Inglis* was a case involving the exercise of a legal monopoly, but he contended that, irrespective of such conditions, a business may be so invested with a public character as to make its rates subject to regulation. He said on this point:[13]

"There are elements of publicity in the business of elevating grain which peculiarly affect it with a public interest. They are found in the nature and extent of the business, its relation to the commerce of the state and country, and the practical monopoly enjoyed by those engaged in it."

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[10]In which Mr. Justice Strong concurred.

[11](1891) 143 U. S. 517.

[12]*Sub nom.* People *v.* Budd (1889) 117 N. Y. 1, 22.

[13]*Id.*

Judge Andrews then enlarged on each of these "elements," and concluded that, as a result of their presence, the business was so "affected with a public interest" as to justify legislative regulation of rates under the police power.

The facts in *Budd* v. *New York* were practically identical with those in *Munn* v. *Illinois,* so that when *Budd* v. *New York* came before the Supreme Court of the United States that court frankly admitted that the real question before it was whether it should reaffirm the doctrine of that earlier case, or repudiate it.[14] The majority opinion, written by Mr. Justice Blatchford, summarized the opinion of Judge Andrews in the decision appealed from and approved it; then proceeded to a digest of the cases, federal and state, in which *Munn* v. *Illinois* had been approved or followed, and finally concluded that that case was correctly decided.

Two judges dissented in the New York Court of Appeals, and three justices dissented in the Supreme Court of the United States. In the latter court Mr. Justice Brewer[15] wrote the dissenting opinion. He asserted in this opinion that the dissenting opinion in *Munn* v. *Illinois* was correct; that the decisions in that case and the instant case upheld as constitutional an unwarrantable extension of the police power, and that power to regulate rates exists only where the use is public, while it does not exist where the use is merely one in which the public has an interest.

Notwithstanding the vigorous dissents in each of the cases which I have discussed, they seem to have established definitely that businesses, not previously under the duty to serve for reasonable compensation, may be compelled by statute to serve for a stated compensation, under certain circumstances, through the exercise of the police power. It would seem equally clear from a careful reading of the prevailing opinions in these cases that the circumstances which were held to justify such exercise of the police power are the great importance of the particular business to the public, and the monopolistic tendency of that business. The concurrence of these circumstances makes possible the oppression of the public, and justifies legislation under the police power to prevent such oppression.

It would seem a reasonable conclusion from these cases that virtual monopoly or a monopolistic tendency is a necessary condition precedent to the exercise of the police power in the way of

[14]Budd *v.* New York (1891) 143 U. S. 517, 528.

[15]With whom concurred Mr. Justice Field and Mr. Justice Brown.

regulating rates. This seems clearly to have been the opinion of Mr. Justice Bradley,[16] for he said later,[17] of the decision in *Munn* v. *Illinois*:

"* * * The inquiry there was as to the extent of the police power in cases where the public interest is affected; and we held that when an employment or business becomes a matter of such public interest and importance as to create a common charge or burden upon the citizens; in other words, when it becomes a practical monopoly, to which the citizen is compelled to resort, and by means of which a tribute can be exacted from the community, it is subject to regulation by the legislative power."

Judge Cooley in his work on Constitutional Limitations,[18] in discussing *Munn* v. *Illinois,* comes to this conclusion:

"* * * it seems to have been the view of both courts in this case, that the circumstances were such as to give the warehousemen in Chicago, who were the only persons affected by the legislation, a 'virtual' monopoly of the business of receiving and forwarding the grain of the country to and from that important point, and by the very fact of monopoly to give their business a public character, affect the property in it with a public interest, and render regulation of charges indispensable."

It is submitted that the interpretation of the prevailing opinions in *Munn* v. *Illinois* and *Budd* v. *New York,* suggested above—namely, that charges in businesses may be regulated by legislation when they are of importance to the public and monopolistic in character or tendency—which interpretation appears not only to be justified but actually to be demanded by the language there used, would establish a good working doctrine, and would thoroughly protect the public, without recognizing a right in the state legislatures to regulate the prices at which all commodities shall be sold, and all services rendered. However, this interpretation has been entirely repudiated by the Supreme Court of the United States in the case of *Brass* v. *North Dakota.*[19] It there appeared that, although the North Dakota statute was similar to the Illinois and New York statutes in most particulars, it differed in this, that it was not made to apply simply to large centers through which grain passed in vast quantities. It also appeared that there was no monopolistic condition or tendency in the busi-

[16]Who concurred in Mr. Chief Justice Waite's prevailing opinion in Munn *v.* Illinois.

[17]Sinking Fund Cases (1878) 99 U. S. 700, 747.

[18](7th ed.) 873.

[19](1894) 153 U. S. 391.

ness of grain elevating in North Dakota. These facts were relied upon by the defense to differentiate this case from *Munn* v. *Illinois* and *Budd* v. *New York*. Mr. Justice Shiras, speaking for five justices, said:[20]

"These arguments are disposed of, as we think, by the simple observation, already made, that the facts rehearsed are matters for those who make, not for those who interpret, the laws. When it is once admitted, as it is admitted here, that it is competent for the legislative power to control the business of elevating and storing grain, whether carried on by individuals or associations, in cities of one size and in some circumstances, it follows that such power may be legally exerted over the same business when carried on in smaller cities and in other circumstances. * * * It may be true that, in the cases cited [*Munn* v. *Illinois* and *Budd* v. *New York*], the judges who expressed the conclusions of the courts entered, at some length, into a defense of the propriety of the laws which they were considering, and that some of the reasons given for sustaining them went rather to their expediency than to their validity. * * * Still, in the present instance [*i. e.* the decisions in *Munn* v. *Illinois* and *Budd* v. *New York*], the obvious aim of the reasoning that prevailed was to show that the subject matter of these enactments fell within the legitimate sphere of legislative power, and that, so far as the laws and Constitution of the United States were concerned, the legislation in question deprived no person of his property without due process of law, and did not interfere with Federal jurisdiction over interstate commerce."

Mr. Justice Brewer[21] dissented in this case on the grounds that,

(1) "by this decision a party is compelled by the mandate of the court to engage in a business which he never intended to engage in, and which he does not desire to engage in, to wit, the business of maintaining a public elevator."

(2) "the facts show, in the words of Mr. Justice Bradley, no 'practical monopoly, to which the citizen is compelled to resort, and by means of which a tribute can be exacted from the community.'"

(3) The elevator owner is bound to insure the grain.

The majority's opinion in this case knocks out from under the doctrine of rate regulation under the police power the reason which had been thought to be its main support, and leaves us in

[20] *Ibid.* 403.

[21] With whom concurred Mr. Justice Field, Mr. Justice Jackson and Mr. Justice White.

great doubt as to the real nature of the basis upon which it rests. The majority of the court said that the right to so regulate rates does not rest upon the monopolistic character or tendency of the business, but that[22]

"when it is once admitted, as it is admitted here, that it is competent for the legislative power to control the business of elevating and storing grain, whether carried on by individuals or associations, in cities of one size and in some circumstances, it follows that such power may be legally exerted over the same business when carried on in smaller cities and in other circumstances."

But it was "admitted" by the defense that the rates for elevating grain, "in cities of one size and in some circumstances," could be fixed under the police power, on the authority of *Munn* v. *Illinois* and *Budd* v. *New York,* and it must be in conformity with the decisions in those cases that the court asserted[23]

"that such power may be legally exerted over the same business when carried on in smaller cities and in other circumstances."

Then it must be that in those cases is to be found the reason upon which the rate-making power is to be justified under such circumstances as are disclosed in *Brass* v. *North Dakota.* But as we have seen the reason cannot be monopolistic conditions or tendency. The only other reason assigned both in *Munn* v. *Illinois* and in *Budd* v. *New York,* and the only other one assigned at all in *Munn* v. *Illinois,* when it is emphasized, and the only one which would apply in *Brass* v. *North Dakota,* is the importance of the grain elevating business to the public.

This basis of the rate-making power is at once astonishingly broad in its possibilities, and most disconcertingly vague as a working rule. Are we to understand that the present doctrine of the Supreme Court of the United States would justify not only the regulation of prices of oil, coal, steel, meat and other commodities, the production of which is monopolistic in fact or in tendency, as well as being of great public importance, but would also justify the regulation of the prices of clothing of all kinds, cereals of all kinds, eggs, butter, milk and all other commodities in which the public have an interest because of their vital usefulness to the public? The recognition of so inclusive a power of rate regulation in the legislatures of the several states is certainly

[22]Brass *v.* North Dakota (1894) 153 U. S. 391, 403.
[23]*Id.*

startling, and contrary to the opinions of very able thinkers,[24] but seems to be the fair deduction to be drawn from the decisions of the Federal Supreme Court. An able writer sums up the situation this way:[25]

"Where there is neither legal nor actual monopoly, the question of the power to regulate charges presents great difficulties. It seems impossible to deny the constitutional power in the face of such a decision as *Brass* v. *North Dakota* and of the well-established limitation of rates of interest, and there seems, moreover, to be no case in which a reasonable regulation of charges has been declared unconstitutional on the ground that the legislature does not possess such power. * * * The justification for regulating charges in some particular business would usually be that it constitutes a de jure or a de facto monopoly or enjoys special privileges; but it may also be that the commodity selected is a necessary of life, or that it is essential to the industrial welfare of the community, or that it has been immemorially the subject of regulation."[26]

The same question which was involved in the cases already discussed was presented to the Supreme Court of the United States in *Cotting* v. *Kansas City Stock Yards and The State of Kansas*.[27] There the statute in question was one to regulate

[24]Cooley, Constitutional Limitations 872: "What circumstances shall affect property with a public interest is not very clear. The mere fact that the public have an interest in the existence of the business, and are accommodated by it, cannot be sufficient, for that would subject the stock of the merchant, and his charges, to public regulation. The public have an interest in every business in which an individual offers his wares, his merchandise, his services, or his accommodations to the public; but his offer does not place him at the mercy of the public in respect to charges and prices."

Andrews, J., in People *v.* Budd (1889) 117 N. Y. 1, 15, said: "That no general power resides in the legislature to regulate private business, prescribe the conditions under which it shall be conducted, fix the price of commodities or services, or interfere with freedom of contract, we cannot doubt. The merchant and manufacturer, the artisan and laborer, under our system of government, are left to pursue and provide for their own interests in their own way, untrammeled by burdensome and restrictive regulations, which, however common in rude and irregular times, are inconsistent with constitutional liberty." He declares that peculiar circumstances must exist to justify regulation of rates, and explains the decision in Munn *v.* Illinois by quoting Mr. Justice Bradley's comment in the Sinking Fund Cases (99 U. S. 747), already quoted above, to the effect that it was virtual monopoly in grain elevating in Chicago which justified the legislation there under consideration.

[25]Freund, Police Power § 378.

[26]It is worth while to bear in mind that in the case of Brass *v.* North Dakota the Supreme Court of the United States was divided five to four, and that the only member of the court as then constituted who now sits on that bench is Mr. Chief Justice White, who there dissented. None of the justices who participated in the decisions in Munn *v.* Illinois and Budd *v.* New York are now on the bench.

[27](1901) 183 U. S. 79.

charges in stock yards. The judges all agreed that the statute was unconstitutional because it discriminated against the defendant stock yard company. Six of them[28] refused to pass upon the question whether the statute was unconstitutional as depriving the stock yard company of property without due process of law. But Mr. Justice Brewer discussed this question at length, and held that, under the authority of *Munn* v. *Illinois, Budd* v. *New York* and *Brass* v. *North Dakota,* it was constitutional for a state legislature to regulate the rates to be charged by stock yards.

This same question has been more recently passed upon by the Supreme Court of Kansas,[29] and that court declared the statutory regulation of stock yard charges to be constitutional, saying in part:[30]

"The operation of stockyards has more of the characteristics of a public business than the carrying on of an elevator or a warehouse. It possesses the market features, including considerations of sanitation and health, and it also has more of the monopolistic feature. * * * The company has * * * a practical monopoly of a vast business, affecting thousands of people who are almost obliged to deal at that market and at the rates which the company may choose to charge."

The same conclusion has been reached with regard to legislative regulation of rates to be charged by tobacco warehouses.[31]

In *Munn* v. *Illinois*[32] Mr. Chief Justice Waite said:

"It is insisted, however, that the owner of property is entitled to a reasonable compensation for its use, even though it be clothed with a public interest, and that what is reasonable is a judicial and not a legislative question.

"As has already been shown the practice has been otherwise. * * *

"We know that this is a power which may be abused; but that is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not to the courts."

However, the Supreme Court of the United States has subsequently modified its view on this point, and there is at present no doubt that rates fixed by the legislature must be reasonably com-

[28]Mr. Justice Harlan, Mr. Justice Gray, Mr. Justice Brown, Mr. Justice Shiras, Mr. Justice White and Mr. Justice McKenna.

[29]Ratcliff *v.* Wichita Union Stockyards Co. (1906) 74 Kan. 1, 86 Pac. 150.

[30]*Ibid.* 153.

[31]Nash *v.* Page (1882) 80 Ky. 539; Connell *v.* Louisville Tobacco Warehouse Co. (1902) 113 Ky. 630, 68 S. W. 662.

[32](1876) 94 U. S. 113, 133.

pensatory, and that the reasonableness of such rates is a question for the courts.[33]

The legislative imposition of a duty to serve for a named compensation, or for not more than a named compensation, would perhaps of itself impose by implication the duty to serve, to the extent of the facilities, all who should apply, and to do so without discrimination, because without such implication the purpose of imposing the duty to serve at or below a given rate could be largely frustrated. Certainly the imposition of such further duties by express legislation can be justified under the police power in any case where the fixing of rates of compensation can be so justified, and their imposition in that way seems the usual course. For example it appears in the statement of the case of *Munn* v. *Illinois*[34] that by the terms of the Illinois Constitution[35]

"All elevators or storehouses where grain or other property is stored for a compensation, whether the property stored be kept separate or not, are declared to be public warehouses."

There was a similar provision in the North Dakota statute which was under discussion in *Brass* v. *North Dakota*.[36] Such provisions would seem to put the warehouses there described under the duty to serve the public, or they would be without meaning. Probably such provisions alone would, as results of the duty to serve, impose also the duties to serve reasonably and without discrimination, if the statutes of those states did not expressly proceed to determine what are reasonable rates and to require service at such rates, as we have seen that they do, and if those statutes did not also forbid discrimination, as they in fact do.[37]

This part of the present discussion brings us inevitably to this conclusion, that the legislatures of the several states, in the exer-

[33]Covington and Lexington Turnpike Road Co. *v.* Sandford (1896) 164 U. S. 578, and the cases there cited at page 592. See particularly Cotting *v.* Kansas City Stockyards Co. and The State of Kansas (1901) 183 U. S. 79, 95 *et seq.*, where Mr. Justice Brewer contends that the requirement of reasonableness in rates should be more liberally interpreted in favor of a business which merely exercises a use in which the public has an interest, that it should be in favor of a business exercising a public use (*i. e.*, a business which a state might conduct, and wherein public franchises are exercised), in which latter case it is required merely that the rate be not confiscatory.

[34](1876) 94 U. S. 113, 114.

[35]Constitution of Illinois, adopted in 1870, Art. XIII, Sec. 1.

[36](1893) 153 U. S. 391, 400.

[37]Munn *v.* Illinois (1876) 94 U. S. 113, 117 (§ 15 of the Statute of 1871); Brass *v.* North Dakota (1893) 153 U. S. 391, 400.

cise of the police power, can impose the duties to serve all, and to serve reasonably and indiscriminately upon businesses and undertakings, which would not be under such duties as the result of any of the common law principles heretofore discussed. It is also apparent from the decisions of the Supreme Court of the United States, which we have considered, that the class of public service companies may be almost indefinitely enlarged at the will of the state legislatures in the exercise of their police power.

PART IV.

I have been careful in that part of our discussion just finished to state that the businesses affected by the legislation under discussion were not under public services duties "as a result of any of the common law principles heretofore discussed." Nevertheless it has been held that such businesses, at least, as were involved in *Munn* v. *Illinois* and *Budd* v. *New York*, where monopolistic conditions or tendencies were shown, are by common law under public service duties. We must consider the soundness of the contention.

In *Inter-Ocean Publishing Co.* v. *Associated Press*,[38] it appeared that plaintiff entered into a contract with defendant by the terms of which the latter was to supply plaintiff with certain news, and plaintiff was not to deal with any company declared by defendant to be antagonistic to it. Plaintiff did deal with such a company and defendant threatened to cut off the news supply being furnished to plaintiff. Plaintiff sought to enjoin the carrying out of this threat. The court granted the injunction, pointing out that defendant exercised a virtual monopoly through its size, and that its business was one of great importance to the public, so that,[39]

"The appellee corporation being engaged in a business upon which a public interest is engrafted, upon principles of justice it can make no distinction with respect to persons who wish to purchase information and news for the purpose of publication, which it was created to furnish."

Is this decision an exposition of the law, or is it judicial legislation?

Judge Cooley,[40] in distinguishing between the functions of the judiciary and the legislature, says:

[38](1900) 184 Ill. 438, 56 N. E. 822.

[39]*Ibid.* 825.

[40]Cooley, Constitutional Limitations (7th ed.) 133.

"* * * To do the first, therefore—to compare the claims of parties with the law of the land before established—is in its nature a judicial act. But to do the last—to pass new rules for the regulation of new controversies—is in its nature a legislative act."

The Supreme Court of the United States has said of the functions of the judiciary:[41]

"* * * A court of chancery is not, any more than is a court of law, clothed with legislative power. It may enforce, in its own appropriate way, the specific performance of an existing legal obligation arising out of contract, law, or usage, but it cannot create the obligation."

And that court has said again:[42]

"* * * The legislature may impose a duty, and when imposed it will, if necessary, be enforced by the courts, but, unless a duty has been created either by usage or by contract, or by statute, the courts cannot be called on to give it effect."

In *Inter-Ocean Publishing Co.* v. *Associated Press*[43] the Publishing Company certainly was not attempting to enforce a contractual right. Just as clearly there was no usage of defendant or of others similarly situated to serve all applicants—whatever usage existed was quite the other way. It was not claimed that defendant was under any statutory duty to serve. Then if there was any duty it must have been grounded on some common law principle. The common law principle sought to be established is apparently this, that when a business is of importance to the public, and is virtually monopolistic, a public interest becomes "ingrafted" upon it, and "upon principles of justice it can make no distinction with respect to persons who wish to purchase information." We must see whether there is generally recognized any such common law principle, or whether the court here attempted (unconsciously) to make law.

The court cited telegraph cases, but we have seen that the duty to serve on the part of telegraph companies rests on other and thoroughly established grounds.[44] The court also cited in support of its position *Munn* v. *Illinois*[45] and *New York & Chicago Grain*

[41]Atch. Top. & S. F. R. Co. *v.* Denver & N. O. R. Co. (1883) 110 U. S. 667, 682.

[42]Express Cases (1885) 117 U. S. 1, 29.

[43](1900) 184 Ill. 438, 56 N. E. 822.

[44]Part II of this article, at pp. 622-624 of the present volume.

[45](1876) 94 U. S. 113.

& Stock Exch. v. *Board of Trade of the City of Chicago.*[46] As we have seen, *Munn* v. *Illinois* decided that under the police power the rates charged by grain elevators could be regulated by statute under the circumstances there shown, and the question whether grain elevators thus circumstanced would at common law be bound to serve the public reasonably and indiscriminately was not before the court. And yet perhaps in the *Inter-Ocean Case* the citation of *Munn* v. *Illinois* was not wholly without reason, for the quotations there contained from Lord Hale's writings and from *Allnutt* v. *Inglis* are more pertinent to the question involved in the *Inter-Ocean Case* than to that involved in *Munn* v. *Illinois,* and there is also language used towards the end of Mr. Chief Justice Waite's opinion in *Munn* v. *Illinois* which may seem to have a bearing upon the present question.

The first quotation from Lord Hale contained in *Munn* v. *Illinois*[47] is from his treatise *De Jure Maris*[48] where he discusses ferries, and says that a man may only run a public ferry in the exercise of a franchise, as a consequence of which he is bound to "give attendance at due times, keep a boat in due order, and take but reasonable toll." The duties resulting at common law from the exercise of a franchise we have already discussed,[49] but the questions in the *Inter-Ocean Case* and *Munn* v. *Illinois* have nothing to do with the duties resulting from the exercise of a franchise.

The second quotation from Lord Hale contained in *Munn* v. *Illinois*[50] is from his treatise *De Portibus Maris,*[51] where he discusses wharves. The language of importance is as follows:

"* * * If the king or subject have a public wharf, unto which all persons that come to that port must come and unlode or lode their goods as for that purpose, because they are the wharfs only licensed by the queen, * * * or because there is no other wharf in that port as it may fall out when a port is newly erected; in that case there cannot be taken arbitrary and excessive duties for cranage, wharfage, pesage, etc., neither can they be enhanced to an immoderate rate; but the duties must be reasonable and moderate, though settled by the king's license or charter. For now the wharf and crane and other conveniences are affected

[46](1889) 127 Ill. 153.
[47](1876) 94 U. S. 113, 126.
[48]1 Harg. Tracts 6.
[49]Part II of this article.
[50](1876) 94 U. S. 113, 127.
[51]I Harg. Tracts 78.

with a public interest, and they cease to be *juris privati* only; as if a man set out a street in a new building on his own land, it is now no longer bare private interest, but is affected by a public interest."

It seems clear that by the early common law the right to conduct a public wharf and take tolls was a franchise. Judge Andrews in *People* v. *Budd*[52] said:

"The right to take tolls for wharfage in a public port was also a franchise, and tolls, as Lord Hale says, could not be taken without lawful title by charter or prescription."[53]

but Judge Andrews went on to explain the quotation from Hale given above as referring throughout to public wharves—*i. e.*, to wharves conducted by the king, or under a franchise obtained by charter or prescription. In *Bolt* v. *Stennett*[54] that part of Lord Hale's treatise *De Portibus Maris* was quoted which is quoted above, and the court concluded as to it:

"From whence it is obvious that Lord Hale considered a public quay to be like a public street, common to all the king's subjects."

The court did not think that Lord Hale was speaking of private wharves enjoying a virtual monopoly, but of public wharves, "like a public street."

The case of *Allnutt* v. *Inglis*[55] was decided ten years later. The question at issue in that case was as to whether the London Dock Company could make any charge it saw fit for goods entered at the port of London in bond, or could only make a reasonable charge. It was held that the company could only make a reasonable charge. An examination of the opinions delivered by each of the judges[56] makes it absolutely clear that the members of the court were unanimous in the reason for their decision, namely,

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[52](1889) 22 N. E. 670, 676.

[53]117 N. Y. 1, 18, citing De Portibus Maris, 77. See to the same effect Chitty, Prerogatives 174; Cooley, Constitutional Limitations 876; Wiswell *v.* Hall (N. Y. 1832) 3 Paige 313, 318; Mayor etc. *v.* Steamer "Mary Lewis" (1880) 32 La. Ann. 1293, 1294. As to the compromise finally effected at common law between the conflicting rights of the king, the public and the riparian owners, and the law as to wharves in the United States see a note entitled "Right to Erect Wharves." 4 L. R. A. 635.

[54](1800) 8 D. & E. 606, 608.

[55](1810) 12 East 527. This case is discussed in Part II at pages 636 and 637 of this volume.

[56]Lord Ellenborough, C. J., Grose, J., Le Blanc, J., and Bayley, J.

that under the Acts of Parliament the London Dock Company exercised a *legal* monopoly. Lord Ellenborough said:

"* * * The question then is, whether circumstanced as this company is by the combination of the Warehousing Act with the Act by which they were originally constituted, and with the actually existing state of things in the port of London, whereby they alone have the warehousing of these wines, they be not, according to the doctrine of Lord Hale, obliged to limit themselves to a reasonable compensation for such warehousing? And according to him, wherever the accident of time casts upon a party the benefit of having a legal monopoly of landing goods in a public port, as where he is the owner of the only wharf authorized to receive goods, which happens to be built in a port newly erected, he is confined to take reasonable compensation only for the use of the wharf."

Thus we see that Lord Ellenborough conceived that Lord Hale, in the passage above quoted, was dealing with the liability of wharves which are public because they are in the exercise of the only franchise. If Lord Ellenborough had stopped with his actual decision the case of *Allnutt* v. *Inglis* would raise no difficulty, but he unfortunately felt called upon to add the following *dictum*:[57]

"* * * and it is enough that there exists in the place and for the commodity in question a virtual monopoly of the warehousing for this purpose, on which the principle of law attaches, as laid down by Lord Hale in the passage referred to, which includes the good sense as well as the law of the subject."

If Lord Ellenborough meant by this language that a warehouse which was a public warehouse because it exercised some franchise, was bound to serve at reasonable rates when it has a virtual monopoly he is perfectly correct, because such a warehouse would be bound to so serve in the absence of such a virtual monopoly. But if he meant that if any private business has obtained a virtual monopoly that business is bound by the duties of public service, it would seem that, while intending to state a rule of law, he did in fact attempt (unintentionally) to create one.

Let us now return for a moment to *Munn* v. *Illinois*[58] and see how far, if at all, it supports the decision in *Inter-Ocean Publishing Co.* v. *Associated Press*.[59] Except for the quotations from

[57](1810) 12 East 527, 540.
[58](1876) 94 U. S. 113.
[59](1900) 184 Ill. 438, 56 N. E. 822.

Allnutt v. *Inglis,* and from Hale's treatises *De Jure Maris* and *De Portibus Maris,* which we have just discussed, there is but one page of Mr. Chief Justice Waite's prevailing opinion in *Munn* v. *Illinois* which can be construed as lending any countenance to the doctrine propounded in the *Inter-Ocean Case.* Towards the end of his opinion he said:[60]

"It is insisted, however, that the owner of property is entitled to a reasonable compensation for its use, even though it be clothed with a public interest, and that what is reasonable is a judicial and not a legislative question."

The Chief Justice answered that "the practice has been otherwise," and that the legislature is the sole judge of the reasonableness of such a statute. He continued:[61]

"* * * The controlling fact is the power to regulate at all. If that exists, the right to establish the maximum of charge, as one of the means of regulation, is implied. In fact the common law rule, which requires the charge to be reasonable, is itself a regulation as to price. Without it the owner could make his rates at will, and compel the public to yield to his terms or forego the use.

"But a mere common-law regulation of trade or business may be changed by statute. A person has no property, no vested interest, in any rule of the common law. * * * Indeed the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances. To limit the rate of charge for services rendered in a public employment, or for the use of property in which the public has an interest, is only changing a regulation which existed before. It establishes no new principle of law, but only gives a new effect to an old one."

It may be said with regard to this language that it is indefinite and seems only to be thrown in as a make-weight; that the case has been overruled so far as the point there under discussion was involved, and that Mr. Chief Justice Waite's whole opinion shows a confusion of ideas as to the common law duty to serve, and the right to impose such duty by statute. But if we concede that the language quoted above may be construed as a *dictum* by Mr. Chief Justice Waite to the effect that a business, circumstanced as that of the defendant in *Munn* v. *Illinois,* was under a common law duty to serve for reasonable compensation, and that the legisla-

[60]Munn *v.* Illinois (1876) 94 U .S. 113, 133.
[61]*Ibid.* 134.

tive regulation of rates might be justified on that ground, I think it is without support except in Lord Ellenborough's *dictum* in *Allnutt* v. *Inglis,* and I am convinced that the Supreme Court of the United States would not now follow him in that view. That view would lead to a most surprising doctrine, namely, that all businesses which are of importance and interest to the public must at common law serve for reasonable compensation, for in view of the case of *Brass* v. *North Dakota*[62] we must understand that the Supreme Court of the United States justifies *Munn* v. *Illinois* on the ground that state legislatures may regulate rates of businesses which are of importance and interest to the public and we must understand Mr. Chief Justice Waite to be speaking of such businesses. But this would be an even more startling proposition than that actually laid down in *Brass* v. *North Dakota,* and surely would not command the assent of the majority of our Federal Supreme Court.

Munn v. *Illinois,* then, seems a most unsatisfactory support for the decision in *Inter-Ocean Publishing Co.* v. *Associated Press.*[63] But the court in that case also depended upon the earlier Illinois case of *New York & Chicago Grain & Stock Exch.* v. *Board of Trade of the City of Chicago.*[64] That case is an authority in point. It appeared that the defendants had allowed the Western Union Telegraph Company to report transactions on its floor, and this the company did for a large number of patrons. Then defendants started reporting such transactions themselves to the telegraph company to be transmitted to such persons as the defendant specified. Under this system plaintiff was being served, but defendants threatened to deprive plaintiff of the service, and the plaintiff brought action to enjoin them from doing so. The court declared that the operations of defendants had great influence in commercial dealings all over the country; that this was largely the result of the operation of the ticker service which had been given, and that in consequence of these facts continued service was of great importance to the public. The court then said:[65]

"Assuming these market quotations and reports are property, and the private property of the Board of Trade, yet if they have been so used by the board, and by the telegraph companies with the knowledge and consent of the board, as to be affected with a

[62](1894) 153 U. S. 391.
[63](1900) 184 Ill. 438, 56 N. E. 822.
[64](1889) 127 Ill. 153.
[65]*Ibid.* 163.

public interest, then they are subject to such public regulation by the legislature and the courts as is necessary to prevent injury to such public interest."

The court cited *Munn* v. *Illinois* in support of this view.

However, the subsequent Illinois case of *American Live Stock Commission Co.* v. *Chicago Live Stock Exchange*[66] was not referred to or cited in the *Inter-Ocean Case.* Although the court in *American Live Stock Commission Co.* v. *Chicago Live Stock Exchange* attempts to distinguish the earlier case which I have just discussed, yet they cannot in fact be reconciled, nor can the case now under discussion be reconciled with the *Inter-Ocean Case,* as will be clear from a statement of it.

Plaintiffs contended that defendants were under a duty to serve all applicants. It appeared that defendants operated the largest stock market in the world. The court said in part:[67]

"* * * But we are not prepared to hold that the mere fact that the business of a particular market has become very large gives to the courts any power to declare such markets public, and impressed with a public use, or to apply to them rules of public policy peculiar to that class of markets.

* * * * * * * * * * *

"It is not claimed that the keeping or doing business in a market of this character is one of the employments which the common law declares to be public, nor is it pretended that it has been made so by statute. Ordinarily the adoption of new rules of public policy, or the application of existing rules to new subjects, is for the legislature, and not for the courts. Accordingly, it may be held to be a general, though perhaps not an invariable, rule that the question whether a particular business which has hitherto been deemed to be private, is public and impressed with a public use, is for the legislature."

The court then cited with unqualified approval the case of *Ladd* v. *The Southern Cotton Press and Manufacturing Co.,*[68] and held that the doctrine there enunciated was exactly applicable to the situation in hand. The court also discussed *Munn* v. *Illinois,* and distinguished it as a case where the legislature had acted, and where the decision, therefore, was not as to the common law duties of grain elevators.

American Live Stock Commission Co. v. *Chicago Live Stock Exchange*[69] is undoubtedly more carefully considered and more

[66](1892) 143 Ill. 210.

[67]*Ibid.* 237, 238.

[68](1880) 53 Tex. 172. This case is discussed later.

[69](1892) 143 Ill. 210.

soundly reasoned than the earlier case of *New York & Chicago Grain & Stock Exch.* v. *Board of Trade of the City of Chicago,*[70] or the later case of *Inter-Ocean Publishing Co.* v. *Associated Press,*[71] and this fact, together with the conflict itself among the Illinois cases, and the fact that *American Live Stock Commission Co.* v. *Chicago Live Stock Exchange* was not cited in *Inter-Ocean Publishing Co.* v. *Associated Press* goes far to weaken the latter case as authority, even in its own jurisdiction.

There is another case which seems to be in accord with the *Inter-Ocean Case,* namely, *State* v. *Nebraska Telephone Co.*[72] This was a mandamus proceeding to compel the company to give relator telephone service. The court concluded that the company must serve the relator, and said:

"The views herein expressed are not new. Similar questions have arisen in, and have been frequently discussed and decided by, the courts, and no statute has been deemed necessary to aid the courts in holding that when a person or company undertakes to supply a demand which is 'affected with a public interest,' it must supply all alike who are alike situated, and not discriminate in favor of, nor against any."

The court cited in support of its decision Lord Ellenborough's *dictum* in *Allnutt* v. *Inglis,*[73] discussed above. Of course the decision could have been placed upon the ground that the respondent was using the public streets, for, although the court said "that the respondent is not possessed of any special privileges," it in fact contradicted this by saying: "The wires of respondent pass the office of the relator. Its posts are planted in the street in front of his door."[74]

In the same year in which the *Inter-Ocean Case* was decided the Associated Press was made respondent in a mandamus proceeding in Missouri,[75] brought upon relation of a newspaper to compel respondent to furnish it with news. The court held that

[70](1889) 127 Ill. 153.

[71](1900) 184 Ill. 438, 56 N. E. 822.

[72](1885) 17 Neb. 126, 134-135.

[73](1810) 12 East 527.

[74]In some other cases virtual monoply has been referred to as though it were a possible ground for public service duties, although the decisions in those cases have really been reached on the ground of grant of franchises or statutory duty. See for example, Williams *v.* Mutual Gas Co. (1884) 152 Mich. 499; Wheeler *v.* Northern Cal. Irrigation Co. (1887) 10 Col. 582; Owensboro Gaslight Co. *v.* Hildebrand (Ky. 1897) 42 S. W. 351; Cincinnati H. & D. R. R. Co. *v.* Village of Bowling Green (1879) 57 Oh. St. 336. And see Mr. Justice Miller's comment on Munn *v.* Illinois in Wabash etc. Ry. Co. *v.* Illinois (1886) 118 U. S. 557, 569.

[75]State *v.* Associated Press (1900) 159 Mo. 410, 60 S. W. 91.

the writ should not issue; that mere size of business, and public interest in the business of respondent were not sufficient to impose a duty to serve. The court declared that telegraph and telephone cases, and others of similar character were no authority, because in those cases the companies in question exercise public franchises. The court severely criticised *Munn* v. *Illinois* and reviewed the Illinois decisions, pointing out their irreconcileability. The court also pointed out that *Allnutt* v. *Inglis* was a case of legal monopoly; that Lord Ellenborough's *dictum* as to virtual monopoly is based upon Lord Hale's writings, and that Lord Hale was writing about wharves which were always considered as in the exercise of a sort of privilege, because of the rights of the crown. The court finally quoted from *Ladd* v. *The Southern Cotton Press & Manufacturing Co.*[76] and *American Live Stock Commission Co.* v. *Chicago Live Stock Exch.*,[77] where they distinguish *Munn* v. *Illinois* from such a case as was here before the court on the ground that *Munn* v. *Illinois* only decided that the legislature may have power to impose public service duties on businesses which are not under such duties at common law.

Ladd v. *The Southern Cotton Press & Manufacturing Co.*,[78] already referred to, is an exceedingly interesting case. Plaintiff sued to recover certain sums paid as "shipper's charges." Part of plaintiff's contention was that defendant "had submitted its property and service to public use," and that its charges were in excess of what such a company may charge. The first ground of plaintiff's contention was that by becoming a compress company defendant submitted its property and service to a public use. The court said as to this:[79]

"* * * We are cited to no authority tending to support this proposition, and we are unable to perceive any principle or reason upon which it can be maintained."

The second ground of plaintiff's contention was that such a public use resulted "by virtue of the nature and extent of the business." The court said as to this:[80]

"* * * It is not one of the employments which the common law declares public. * * * Nor is it claimed to have been made so by statute. And we know of no authority, and none has

[76](1880) 53 Tex. 172.
[77](1892) 143 Ill. 210.
[78](1880) 53 Tex. 172.
[79]*Ibid.* 188.
[80]*Ibid.* 188, 189.

been shown us, for saying that a business strictly *juris privati* will become *juris publici,* merely by reason of its extent. * * *

"If the right to regulate property and the character of its employment is, by reason of its extent, and the number of persons interested in or affected by the manner or circumstances of its use, as counsel for appellee forcibly declares, 'of the very essence of the government,' the exercise of this right or power pertains to the legislative and not the judicial department."

Finally, plaintiff insisted that the use of defendant's property and services was public because it with others had obtained a virtual monopoly of the business of cotton pressing in Galveston. As to this the court said:[81]

"* * * But conceding the premises, the conclusion sought to be deduced seems to us to be a *non sequitur.*

"* * * But certainly this [virtual monopoly] does not change the nature of the employment in which they are engaged, or authorize the court to say, when the business of the parties is strictly private, that it has become public. If the combination is illegal, the parties to it will subject themselves to such penalties as the law imposes; and if the injury to society to be apprehended from such combinations is of a character demanding it, the legislature may, by adequate provision, regulate or prohibit persons from engaging in them."

Plaintiff in the Texas case relied greatly upon *Munn* v. *Illinois,* but the court could not see its force as an authority in the controversy then before it. The court said of that case:[82]

"* * * It was brought to enforce the statute law of the state. The conclusion to be drawn from it is, as we think, that the legislature may declare a particular business *publici juris,* if the facts and circumstances under which it is conducted justifies, and the good of society requires it; but not that the court may so treat it in advance of legislative recognition or declaration."

The last case to be considered is *Delaware, L. & W. R. Co.* v. *Central Stock-Yard & Transit Co.*[83] This was an action to compel defendants to receive stock tendered at their yards. The court held[84] that a court of equity or of law can only enforce a duty when it rests upon contract, long established custom, recognized principles of law, or statute; if they do more they are legislating. And the court held that the duty here sought to be enforced has no legal foundation. Comparing defendants with common carriers the court said that the difference is that defendants are recipi-

[81] *Ibid.* 189.
[82] *Ibid.* 191, 192.
[83] (1890) 45 N. J. Eq. 50.
[84] Two judges dissented.

ents of "no privilege or prerogative of government" as carriers are,[85]

"and they cannot, therefore, be held to be subject to the duties which may be implied from a grant of a franchise authorizing the construction of a public highway."

The court then summarized the facts and decision in *Munn* v. *Illinois,* and said:[86]

"From this statement of the law, it would seem to be undeniable that, until the proper public authority intervenes and establishes such regulations as it may deem necessary for the public good, the owners of property, devoted to a public use of this character, retain complete and absolute dominion over it, and may exclude any members of the public from its use that they see fit. Until the body politic puts in exercise its power to control the use of such property, its owner may use it as he pleases."

It seems to me that this discussion has made it clear that the common law does not impose public service duties upon businesses simply because they are of importance to the public and are enjoying a virtual monopoly.[87] The only legitimate method of controlling the service and charges of such business is by legislative regulation. Any attempt by the courts to impose public service duties upon such businesses, independent of statutory regulation, constitutes judicial legislation, or, in other words, a usurpation of the functions of an entirely separate branch of the government. I frankly admit that there are *dicta* in support of such judicial action, and that there are one or two decisions which are based on the assertion that the right to so act inheres in the courts of common law. However, I believe I have shown that both the reasoning and authorities by which the courts have sought to support such decisions and such *dicta* (in the rare instances where the latter are more than unargued suggestions) are most unsatisfactory, and that the cases which take an opposing position are at once more numerous and present a sounder exposition of the law.

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[85]Delaware, L. & W. R. Co. *v.* Central Stock-Yard & Transit Co. (1890) 45 N. J. Eq. 50, 60.

[86]*Ibid.* 62.

[87]As I have already pointed out in the present article (at pp. 514 and 620 of this volume) Professor Wyman takes a different view of the law, believing that virtual monopoly is the one real reason in the case of all public service companies for the imposition of the peculiar public service duties.